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No. 87-1066

In The
# Supreme Court of the United States
October Term, 1987

SIERRA MARKETING CO. a partnership of RALPH BAWDEN and MOISE GALLEGOS,

*Petitioners,*

v.

ROTATIONAL MOLDING INC. a California corporation,

*Respondent.*

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether the decision of the Ninth Circuit directly conflicts with applicable California state substantive law, and violates this Court's ruling in *Erie R. Co. v. Tompkins*, and the Rules of Decision Act, 28 USC 1652.

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## INTRODUCTION

On December 23, 1987, the Petitioners herein filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. On or about January 26, 1988, the Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari. The Petitioners are compelled to file this Reply Brief for the following reasons.

First, the Respondent, in its brief, has seriously and deliberately attempted to mislead this Court as to the law and facts herein, and the attempt may amount to a perpetration of a fraud upon this Court.

Second, the law of the State of California on sales agency contracts is in complete conformity with the law in the rest of the nation, and upholds the validity of sales agency contracts even when price and quantity are not specified.

Third, the decision of the Ninth Circuit Court of Appeals directly conflicts, not only with decisions of other Courts of Appeal, but also with the law of California, and therefore violates the Rules of Decision Act, 28 USC 1652, and the rule set forth by this Court in *Erie R. Co. v. Tompkins.*

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## MISREPRESENTATIONS BY THE RESPONDENT

### 1. Respondent's Attempt to Mislead the Court as to the Facts.

Throughout its brief, the Respondent continually tries to mislead this Court as to the facts and the law, but in many cases, he exposes his attempts himself.

On page 4 of Respondent's brief, he states that "the only Quota schedule that was ever prepared or considered was submitted by Respondent to Petitioners as an

attachment to a proposed *Addendum* to *Basic Sales Agency Agreement* prepared by Respondent on March 23, 1984, containing several proposed amendments to the agreement which were rejected by the Petitioners." (Emphasis added) After correctly stating that the Respondent was proposing an *addendum* to an existing prior agreement, the Respondent reverses himself and attempts to characterize the situation as one in which two parties, with no agreement between them, are negotiating terms. His next sentence states that "Petitioners would lead this Court to believe that a party in negotiation has the right to accept a portion of a counteroffer while rejecting the balance of the counteroffer and thereby create a binding contract." The record in this case clearly proves that the Respondent knew it was bound by the contract between the parties, and that it proposed an *addendum* (Respondent's language) to that contract which they intended to force the Petitioners to accept. (Petition Appendix, D, E,F,G) Now, the Respondent attempts to mislead this Court by creating the illusion that no agreement was ever signed, and that the parties were merely "in negotiation," a fiction which no amount of verbiage can sustain.

In addition, the amendments contained in the Addendum (which was drawn up and submitted by the Respondent), all attempted to alter terms firmly set forth in the original contract, except for the Quota schedule. That was proposed to fill the as yet unagreed upon term in the original contract. The Petitioners accepted it as such, (Petition Appendix H), but rejected the *alterations* to the contract. That is the difference that the Respondent deliberately overlooks. All of the items in the Addendum altered existing provisions in the original contract. The proposed Quota schedule did not, and was therefore sev-

erable from the other items. It was proposed to fill in the only unagreed upon term in the contract.

Two weeks after the contract was signed, in May, 1983, the *only* unagreed upon term in the contract was the quota schedule. The parties agreed that they needed more time to determine a quota. (RT 63, 64) In March, 1984, the Respondent sent a proposed quota schedule to the Petitioners, along with an Addendum containing proposed *alterations* to the contract. The Petitioners accepted the quota schedule, but rejected any alterations to the contract with the exception of lowering their commission rate. (Petition Appendix H)

Also on page 4 of its brief, the Respondent states that "Petitioners resisted Respondent's attempts to increase the price of the proposed Septic Tanks and the parties never reached a final agreement on the price." With that sentence, the Respondent attempts to mislead this Court into believing that some agreement was necessary as to price. The opposite is true. The wording of the contract clearly proves that no agreement was necessary as to price. (Petition Appendix D) Prices were to be as set forth in an attached schedule, *or*, as later set by the Respondent. There was no attached schedule, so the alternative clause was given operative effect, placing a unilateral duty upon the Respondent to set the price of its product. Yet, the Respondent still attempts to mislead this Court.

On page 5 of its brief, the Respondent claims that "Petitioners made no further efforts with respect to Respondent's proposed septic tanks" after the prototype came out. This is a particularly egregious attempt to mislead this Court. The statement directly contradicts the trial record herein. The Respondent had attempted to "cancel" the contract one month before the prototype

came out. After the prototype came out, in April, 1984, the Petitioners were still attempting to persuade the Respondent to honor the contract, by correspondence and telephone, and they continued to do so until this suit was filed in August, 1984. (Petition Appendix H)

Contrary to Respondent's statement on page 5, the record conclusively shows that Mr. Sweet was not a "design agent" or agent of any kind for the Petitioners. (RT 268-269) He was simply one of the Petitioners' potential customers with extensive knowledge of this type product.

Finally, on page 5 of its brief, the Respondent attempts to mislead this Court by stating that, after the prototype failed twice, the "Respondent discontinued all further efforts to develop or manufacture a septic tank." There is absolutely nothing in the record to substantiate that statement.

The Respondent again bogs down in contradictions on page 8 of its brief, continuing a contention it made on page 5, when it states "the agreement is silent as to the responsibility for the design and manufacuring of the proposed septic tanks. Contrary to the Petition, the Petitioners' evidence at the trial in the District Court showed that the parties verbally agreed that the proposed septic tank would be designed to meet the criteria specified by Sweet, but the prototype septic tank built by Respondent was totally unacceptable to Sweet and the petitioners . . ." Under California law, the contract clearly and completely placed the duty of manufacture and design upon the Respondent, because the Respondent was charged with manufacturing the product and design is normally a part of the manufacturing process. However, for a moment, we should try to follow Respondent's line of thought. The Respondent would have us believe that the parties verbally agreed that mutual agreement was

necessary as to design, and that they subsequently agreed, again verbally, upon a design. If that is the case, it strains credulity beyond all bounds that the parties would spend so much time concerned with the design of the product, and then neglect to make any agreement as to who would manufacture the product. The Respondent's theory is more than ludicrous, it is an egregious attempt to mislead the Court. Moreover, if any agreement was necessary as to design, by Respondent's own admission, the parties reached that agreement, and the Respondent is actually saying that the Respondent breached the contract in an additional manner not alleged by the Petitioners. As shown infra, the Respondent's agreement to manufacture and design the product is clearly implied, if not expressed, in the contract.

**2. Respondent's Attempts to Mislead This Court as to the Law.**

On page 10 of its brief, the Respondent states that "virtually every case cited by the Petitioners in the lower courts applied "ordinary contract law" as determined by the forum state to the agreements in question." The statement is blatantly false, and again, the Respondent is trapped in its own attempt to mislead the Court. Those cases, most of which are discussed in the following section or in the Petition, all applied the law of sales agency contracts. Also on page 10, the Respondent says that the Court of Appeals decision "correctly applied California law to the agreement." That statement too is blatantly false, as shown below, and constitutes an unconscionable attempt by the Respondent to mislead this Court. The brazen nature of Respondent's misrepresentations should require sanctions.

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## REASONS FOR GRANTING THE WRIT

### I. California Law upholds the validity of the Contract and is in complete accord with the law in all other cited jurisdictions.

The law of California on sales agency contracts is in complete accord with the law of all other cited jurisdictions, and upholds the validity of sales agency contracts, even when no price or quantity is specified. That is why the Court of Appeals decision marks such a complete and stunning departure from the long-settled rules of interpreting sales agency contracts. No reason whatsoever is given in the opinion for the departure.

In *Milton v. Hudson Sales Corp.* (1957) 152 Cal.App. 2d 418, 313 P.2d 936, a California State Court considered an auto dealership contract, which contained a clause stating that the wholesaler or general distributor would not be liable for any failure to supply cars to the dealer. The distributor argued that, because of the clause, there was no obligation on their part to supply any cars whatsoever, that their promise was illusory, and the contract was therefore invalid and unenforceable. The California Court rejected that argument, stating that "the right to sell cars conferred by the contract implies a correlative promise by the other party to supply those cars." (*Milton*, supra, at 490)

The court in *Milton* cited *Jay Dreher Corporation v. Delco Appliances* (2nd CCA 1937) 93 F.2d 275, and *Marrinan Medical Supply v. Ft. Dodge Serum Co.* (8th CCA) 47 F.2d 458, in support of its decision, which indicates California's concurrence with national law on sales agency contracts.

*J.C. Millet v. Park & Tilford Distillers* (DC Cal. 1954) 123 F. Supp. 484, was a Diversity case which was expressly governed by California law, just as the instant case is.

In *Millet*, the Plaintiff distributor sought to enforce his distribution contract, which contained no quantity term, no price term, and no duration term. The Court, applying California law, held the contract valid and enforceable. In doing so, the Court cited Williston on Contracts, § 1027A, Corbin on Contracts, § 155, and the California Civil Code, § 1655 and § 1656. The two former authorities are set forth in the Petition. The California Civil Code sections provide as follows:

> § 1655. Implied Stipulations. Reasonable stipulations when implied. Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.
>
> § 1656. Implied Incidents. Necessary Incidents implied. All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

In holding that a quantity term was *not* necessary in a sales agency contract, the Court, in *Millet*, cited a long uninterrupted line of California authority, as well as Corbin on Contracts, § 155. It should be noted that the Ninth Circuit, in the instant case, seemed to cite the alleged lack of a quantity term as the basis for its decision. (Petition Appendix A)

The same year that *Millet* was decided, 1954, the federal Court in California, again applying California law, held that, where one party to an agreement undertakes an obligation which is not complete without a mutual corresponding obligation on the other side, courts will read such obligation into the agreement even though it is not spelled out in so many words. (*U.S. v. Outer Harbor Dock*

*& Wharf Co.* (DC 1954) 124 F.Supp. 387. See also: *Mangini v. Wolfschmidt Ltd.* (1958) 331 P.2d 728, upholding the validity of a contract which consisted only of a letter agreement containing no quantity, price, or duration terms. Primary issue was duration of contract.)

In *Seaman's Direct Buying Service v. Standard Oil* (1984) 206 Cal.Rptr. 354, 686 P.2d 1158, a California Court upheld a distributorship contract which contained no price term and no quantity term. Like *Mangini*, supra, the contract in *Seaman's* consisted only of a letter agreement. Neither of the agreements was ever reduced to a formal contract, and both were far less definite and certain than the contract in the instant case. Yet, the California Courts, applying established California law, upheld the validity and enforceability of both.

California law is completely in accord with national law on sales agency or distributorship contracts. The decision of the Court of Appeals in this case conflicts with established California law, as well as with national law on sales agency contracts.

**II. The decision of the Ninth Circuit conflicts with this Court's ruling in Erie R. Co. v. Tompkins, and violates the Rules of Decision Act, 28 USC 1652.**

In 1938, this Court established the principle that Federal Courts in diversity cases must follow the applicable substantive law of the states as to non-federal matters. (*Erie R. Co. v. Tompkins* (1938) 304 US 64, 58 S.Ct. 817, 82 L.Ed. 1188)

The substantive law of California, as discussed above, holds that sales agency and distributorship contracts are valid and enforceable even where no quantity, and no price of the product, is specified. The law of California is uniform on the issue and *no* contrary cases were found.

In addition, never before has a California court applied real estate contract law to a sales agency contract. Under the doctrine set forth in *Erie v. Tompkins*, a federal Court does not have the power to reverse or depart from established state substantive law in non-federal matters.

The decision of the Ninth Circuit in this case completely conflicts with established California substantive law, and violates the rule set forth by this Court in *Erie R. Co. v. Tompkins*, and the provisions of the Rules of Decision Act. For those reasons, the decision of the Ninth Circuit must be reversed.

**III. There is an overriding need for national uniformity on the law of sales agency contracts.**

There is an overriding need for national uniformity on the law of sales agency contracts, because many such contracts, as the one in the instant case, extend across many state and jurisdictional boundaries. At the present time, the national law of sales agency contracts *is* uniform. The Petitioner has been able to find *no* contrary authority to the cases cited in the Petition and this Reply Brief. The Respondent also has not been able to find one single contrary authority to the cases cited by the Petitioners, as shown by the fact that the Respondent has not cited *even one* sales agency contract case. For that reason, the Petitioners, perhaps imprecisely, referred to the national law of sales agency contracts as part of federal common law, in the Petition. There is obviously a uniquely federal interest in maintaining uniformity in the law of sales agency contracts which strongly affect interstate commerce. It is not necessary to this case, however, that such law be considered a matter of federal common law. If it is, then the decision of the Ninth Circuit conflicts with federal common law, and must be reversed.

If it is not, the decision of the Ninth Circuit, as demonstrated, violates the principle set forth by this Court in *Erie R. Co. v. Tompkins,* because it completely departs from, and conflicts with, established, applicable California state law, and the decision must be reversed for that reason.

It is one thing for a court to reverse existing law. Courts, at times, have compelling reasons for doing so, as this Court did in *Erie R. Co. v. Tompkins.* It is entirely another matter for a court to ignore existing law by means of a memorandum decision, as the Ninth Circuit did in this case. In the latter instance, existing law is reversed only for the case being decided, and afterwards, continues on unchanged. The party who loses in the decision is deprived of the protection of precedent, and deprived of his rights to Due Process and Equal protection of the laws. The practice of reversing, or departing from, established law in a memorandum decision cannot be abided. The implications of the practice, including the possibility of corruption, are staggering. If the decision is published, of course, the departure becomes a matter of citable record. Regardless of whether it is published or not, the decision of the Ninth Circuit completely conflicts with California state law, and violates the rule set forth by this Court in *Erie R. Co. v. Tompkins.*

For the foregoing reasons, the Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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